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NOTE

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I. INTRODUCTION

How can two cells – a sperm and an egg – generate so many issues? Consider this example: a couple has difficulty bearing children without medical assistance,[1] so they embark on the journey of in vitro fertilization ("IVF"). IVF, one of many forms of assisted reproductive technology ("ART"),[2] is a fertilization process wherein an egg and sperm cell are manually combined and implanted into the uterus of a female donor or surrogate.[3] After visiting a fertility clinic,[4] the couple decides to proceed with IVF and to cryopreserve, or

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1. Couples dealing with fertility issues are not uncommon. Of women aged fifteen to forty-four, over ten percent have received fertility services at some point in their lives. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, ASSISTED REPRODUCTIVE TECHNOLOGY: FERTILITY CLINIC SUCCESS RATES REPORT 3 (2015), ftp://ftp.cdc.gov/pub/Publications/art/ART-2013-Clinic-Report-Full.pdf.

2. *See In Vitro Fertilization: IFV*, AM. PREGNANCY ASS'N, http://americanpregnancy.org/infertility/in-vitro-fertilization/ (last visited Sept. 7, 2017).

3. *Id.*

4. In 2014, there were 458 reporting fertility clinics in the United States that performed ART procedures. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 1, at 4.

freeze, unused embryos[5] to ease the IVF process should they attempt procreation again in the future.[6] Generally, the fertility clinic asks the couple to sign a contract – called a cryopreservation consent form – to determine the fate of their embryos in case of death, divorce, or other change in circumstance.[7]

Sometimes situations do change, and it is at this critical juncture – when donors have established their embryos' destiny but circumstances are not provided for via contract – where disputes arise and the law crumbles.[8] Suppose a couple divorces and the woman wants to implant the embryos against the man's wishes; should a court be allowed to make that type of decision? Alternatively, should a court be permitted to order disposal of the embryos or have the power to force the couple to give the embryos to research? Should a court deem the frozen embryos "life" or "persons," and if so, determine whether they have protectable constitutional rights?[9] To date, only a handful of states have

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5. This Note will use the term "embryo" to simplify the more precise term of "pre-embryo." For a brief scientific background, and an interesting moral discussion, see Howard W. Jones, Jr. & Charlotte Schrader, *And Just What Is a Pre-Embryo?*, 52 FERTILITY & STERILITY 189 (1989) (available at http://www.fertstert.org/article/S0015-0282(16)60840-3/pdf). A "pre-embryo" is generally considered a fertilized egg within fourteen days of fertilization. *Id.* at 189. Before these fourteen days are completed, the pre-embryo lacks "the appearance of a single primitive streak" which establishes the group of cells as an individual human. *Id.* at 190. Before this time, the pre-embryo could still become twins or may not develop at all. *Id.* The term "embryo" in this Note will be used to encompass all forms of in vitro (taking place outside a living organism) pre-embryos prior to implantation in the uterus.

6. John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 408 (1990). Cryopreservation allows embryos to be preserved for many years. *See How Do Embryos Survive the Freezing Process?*, SCI. AM., http://www.scientificamerican.com/article/how-do-embryos-survive-th/ (last visited Sept. 7, 2017). In cases where the donor and embryo carrier are the same woman, freezing embryos also will "relieve the woman of the physical burden and costs of undergoing ovarian stimulation and egg retrieval during later attempts at IVF pregnancy." Robertson, *supra*. Further, cryopreservation enhances "the chances of pregnancy in later cycles since thawed embryos will be placed in the woman during a natural cycle, free of the stimulating drugs and surgical intrusion." Robertson, *supra*; *see also How Do Embryos Survive the Freezing Process?*, *supra*.

7. A cryopreservation agreement is a contract offered by fertility clinics designating the terms and agreement between a couple and the fertility clinic. Robertson, *supra* note 6, at 409–10. The form also allows couples to provide for the embryos' disposition in the event of death, divorce, or other change in circumstance. *Id.* at 410. For example, common embryo dispositions include donating the embryos to research, discarding the embryos, donating embryos to infertile couples, or awarding embryos to one of the parties. *Id.*

8. *See* Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 56 (1999).

9. Most courts have refused to recognize, or even address, whether frozen embryos are life. *See* Litowitz v. Litowitz, 48 P.3d 261, 271 (Wash. 2002) (en banc) ("It is not necessary for this court to engage in a legal, medical or philosophical discussion

addressed the issue of frozen embryo disposition,[10] and fewer states have enacted legislation to help courts navigate questions of the protectable interests of embryos, contract interpretation in this setting, and constitutional procreation rights.[11]

In Part II, this Note addresses the general background of domestic and international case law and legislation surrounding embryonic disputes. Part III then examines recent case law developments; specifically, it discusses the only existing frozen embryo dispute in Missouri.[12] Finally, Part IV offers a suggested approach for courts to use when addressing these increasingly complex cases.

II. LEGAL BACKGROUND

Although a relatively new concern, frozen embryo disputes have generated a sizeable amount of case law outside of Missouri. Section A of this Part discusses the various approaches state courts use in determining the appropriate disposition of frozen embryos when a couple divorces or separates. Section B then discusses the few state statutes that bind courts when navigating embryonic disputes. Finally, Section C addresses scholars' recommendations, as well as international methods for avoiding frozen embryo disputes.

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whether the preembryos in this case are 'children . . . .'"). *But see Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) ("We conclude that preembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."); Jones & Schrader, *supra* note 5, at 191 ("[T]he pre-embryo deserves to be treated as a special bit of humanity . . . [but] it cannot have the moral equivalent of an adult . . . . This requires the establishment of special rules for its place in society. This niche is different from those of the egg, sperm and the fertilizing egg on the one hand and from the niches of the embryo, fetus, and infant on the other.").

10. Courts have generally used the term "disposition" to encompass the fate of an embryo after an event provided for by contract, such as death, divorce, or separation. *See Davis*, 842 S.W.2d at 590. The list of states that have addressed frozen embryo disposition includes, at least: Illinois in Szafranski v. Dunston, 34 N.E.3d 1132, 1154 (Ill. App. Ct. 2015); Massachusetts in A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000); Missouri in McQueen v. Gadberry, 507 S.W.3d 127 (Mo. Ct. App. 2016); New Jersey in J.B. v. M.B., 783 A.2d 707, 720 (N.J. 2001); New York in Kass v. Kass, 696 N.E.2d 174, 178 (N.Y. 1998); Oregon in *In re* Marriage of Dahl & Angle, 194 P.3d 834, 840–41 (Or. Ct. App. 2008); Pennsylvania in Reber v. Reiss, 42 A.3d 1131, 1137 (Pa. Super. Ct. 2012); Tennessee in *Davis*, 842 S.W.2d at 604; Texas in Roman v. Roman, 193 S.W.3d 40, 49–50 (Tex. App. 2006); and Washington in *Litowitz*, 48 P.3d at 269.

11. *See* MO. REV. STAT. § 1.205 (2016); MO. REV. STAT. § 188.015(9) (2016); FLA. STAT. ANN. § 742.17 (West 2017); LA. STAT. ANN. § 9:121 (2017); N.H. REV. STAT. ANN. § 168-B:15 (2017).

12. *See McQueen*, 507 S.W.3d at 127.

A. Methods State Courts Use to Determine Frozen Embryo Disposition

The United States Supreme Court has yet to address issues arising out of IVF procreation.[13] Without explicit direction, state courts are left to decide these complex issues, dealing with their citizens' most private concerns, on their own. Most courts have taken one of three approaches: the balancing interests approach, the contractual approach, or the contemporaneous mutual assent approach.[14]

1. The Balancing Interests Approach

The balancing interests approach seeks to resolve embryonic disputes by "consider[ing] the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions."[15]

In 1992, the Tennessee Supreme Court became the first major appellate court to consider embryo disposition issues.[16] In *Davis v. Davis*, a divorced couple disputed the custody of their frozen embryos.[17] Without any type of agreement or consent form completed during the IVF process, the court was left to "weigh the interests of each party to the dispute . . . in order to resolve that dispute in a fair and responsible manner."[18] The woman wanted to donate the embryos to another couple, while the man opposed donation and wished to discard the embryos.[19]

The court held that disputes over the disposition of embryos should honor the parties' wishes.[20] However, if no agreement memorializing the parties' wishes exists (as was the case here), the court should weigh the interests of the parties.[21] Balancing the parties' interests, the court found the man's interest in preventing the birth of embryos created from his sperm outweighed the woman's interest in donating the embryos.[22] Where a woman has a reasonable alternative to achieving parenthood, as the court found was the case here,[23] the court concluded "the party wishing to avoid procreation should prevail."[24] The

13. *Davis*, 842 S.W.2d at 601.

14. *See* Coleman, *supra* note 8, at 57–58.

15. *Davis*, 842 S.W.2d at 603.

16. *Id.* at 590 ("[W]e have no statutory authority or common law precedents to guide us . . . .").

17. *See id.* at 592.

18. *Id.* at 591–92 ("There was no discussion, let alone an agreement, concerning disposition in the event of a contingency such as divorce.").

19. *Id.* at 604.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* ("The case would be closer if [the woman] were seeking to use the preembryos herself, but only if she could not achieve parenthood by any other reasonable means.").

24. *Id.*

court ruled in favor of the man, and the fertility clinic proceeded with its protocol for unused embryos.[25]

The Superior Court of Pennsylvania in *Reber v. Reiss* also used the balancing interests approach but reached a different outcome than did the *Davis* court.[26] In *Reber*, a man appealed a Pennsylvania trial court's decision, which awarded embryos to his cancer-ridden ex-wife.[27] As in *Davis*, the couple in *Reber* had not signed a consent form prior to the IVF procedures.[28] Applying the balancing interests approach, the court found that the woman's compelling interest in using the embryos for "what is likely her only chance at genetic parenthood" outweighed the man's interests in not procreating.[29] Consequently, the court awarded the embryos to the woman.[30]

Unlike the previously mentioned frozen embryo disputes, *J.B. v. M.B.* involved a man seeking ownership of the couples' embryos so that he could implant the embryos into a surrogate or donate them to another couple.[31] The woman, though, wanted to discard the frozen embryos after the couple divorced.[32] Although the couple had entered into an agreement before proceeding with IVF procedures, the Supreme Court of New Jersey found that enforcing contracts to enter or terminate familial relations violates New Jersey public policy.[33] Accordingly, the court did not look to the couple's agreement to determine the disposition of the frozen embryos.[34] Instead, the court balanced the interests of the parties and ultimately found the woman's interest in not procreating outweighed the man's interest in procreating because he was "able to become a father to additional children, whether through natural procreation or further in vitro fertilization."[35]

In sum, courts using the balancing approach disregard existing contracts and instead weigh one party's interest in having a child against the burden to the other of unwillingly becoming a parent.[36] The courts have typically not

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25. If frozen embryos remain unused, a fertility clinic will usually discard the embryos after a certain period of time. *See id.* at 604–05.

26. Reber v. Reiss, 42 A.3d 1131, 1136, 1142 (Pa. Super. Ct. 2012).

27. *Id.* at 1133–34.

28. *Id.* at 1136.

29. *Id.* at 1140, 1142.

30. *Id.* at 1142.

31. J.B. v. M.B., 783 A.2d 707, 710 (N.J. 2001).

32. *Id.*

33. *Id.* at 717–20 ("The public policy concerns that underlie limitations on contracts involving family relationships are protected by permitting either party to object at a later date to provisions specifying a disposition of preembryos that that party no longer accepts.").

34. *Id.* at 719–20.

35. *Id.* at 717.

36. *See, e.g.*, *id.* at 719 (recognizing that "persuasive reasons exist for enforcing preembryo disposition agreements" but concluding that "if there is disagreement as to disposition because one party has reconsidered his or her earlier decision, the interests of both parties must be evaluated").

allowed one party to force another to become a parent, with one exception.[37] Courts have allowed parties to use frozen embryos against their counterpart's wishes when a woman lacks the ability to have children without the use of the embryos.[38]

2. The Contractual Approach

Courts using the contractual approach generally presume that an agreement made between the parties at the time of IVF is valid and enforceable.[39] This approach attempts to avoid costly litigation and leaves such private decisions to the interested parties rather than the courts.[40]

In *Kass v. Kass*, the New York Court of Appeals applied the contractual approach to determine whether a cryopreservation agreement between a man and woman should be enforced.[41] The parties agreed that if they were unable to reach a mutually-satisfactory decision as to the disposition of the embryos, the embryos would be given to an IVF program for research.[42] The couple divorced, and despite this agreement, the lower court granted custody of the embryos to the woman, reasoning that "a female participant in the IVF procedure has exclusive decisional authority over the fertilized eggs created through that process, just as a pregnant woman has exclusive decisional authority over a nonviable fetus."[43] However, the state's highest court found the parties "unequivocally manifest[ed] their mutual intention that . . . the pre-zygotes be donated for research to the IVF program" and ultimately honored the parties' original contract.[44]

In *Litowitz v. Litowitz*, a husband and wife signed a cryopreservation consent form that stated "[i]n the event [the Litowitzes] are unable to reach a mutual decision regarding the disposition of [their] pre-embryos, [they] must petition to a [c]ourt of competent jurisdiction for instructions concerning the appropriate disposition of [their] pre-embryos."[45] Upon divorcing, the man

37. *See, e.g.*, *id.* at 717; Reber v. Reiss, 42 A.3d 1131, 1142 (Pa. Super. Ct. 2012) (recognizing the principle and applying its single exception); Davis v. Davis, 842 S.W.2d 588, 603–04 (Tenn. 1992) (discussing the impact of "unwanted parenthood" on a party).

38. *Reber*, 42 A.3d at 1142.

39. *See, e.g.*, Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998).

40. *Id.*; Szafranski v. Dunston, 993 N.E.2d 502, 506 (Ill. App. Ct. 2013).

41. *Kass*, 696 N.E.2d. at 180–82.

42. *Id.* at 176–77.

43. *Id.* at 177.

44. *Id.* at 181; *accord In re* Marriage of Dahl & Angle, 194 P.3d 834, 840 (Or. Ct. App. 2008) ("We conclude that the general framework set forth by the courts in *Davis* and *Kass*, in which courts give effect to the progenitors' intent by enforcing the progenitors' advance directive regarding the embryos, is persuasive."). The *Kass* court uses the term "pre-zygotes" which it defines as "eggs which have been penetrated by sperm but have not yet joined genetic material." *Kass*, 696 N.E.2d at 175 n.1.

45. Litowitz v. Litowitz, 48 P.3d 261, 263 (Wash. 2002) (en banc).

wished to place the embryos up for adoption, while the woman hoped to implant the embryos inside her to pursue pregnancy.[46] Yet, neither party was satisfied because the Washington Supreme Court honored a provision in the couple's contract that stated the eggs were to be thawed out (and eventually destroyed) but not allowed to be further developed after the pre-embryos had been in cryopreservation for five years.[47]

Most recently, in *Szafranski v. Dunston*, the Illinois Appellate Court used the contractual approach where an ex-boyfriend and ex-girlfriend were fighting over their frozen embryos.[48] After the couple's separation,[49] the woman hoped to implant the embryos within her.[50] She argued that in the event of separation, the contract previously entered into by the parties gave her full custody of the embryos.[51] In the alternative, she asked the court to balance the parties' interests and award her custody.[52] Meanwhile, the man asserted his right not to procreate and requested the court prevent her from implanting the embryos.[53]

Ultimately, the court in *Szafranski* held the dispute should be settled by "honoring any advance agreement entered into by the parties" but agreed to use the balancing interests approach if no agreement existed.[54] Applying this framework, the court ignored the written consent form, which stated it would take no action without the parties' mutual consent, and found the couple had previously entered into an oral contract.[55] The court awarded the woman sole custody and use of the embryos.[56] The court also acknowledged that, even in

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46. *Id.* at 264.

47. *Id.* at 271. Five years had passed during the course of the litigation, but the contract was not amended during that time. *See id.* at 268–69. *But see id.* at 273 (Sanders, J., dissenting) ("That by today more than five years has passed since the cryopreservation commenced is irrelevant because the judicial action which provided for the disposition of the preembryos was commenced well within the five-year window thereby tolling the contracted period of limitations.").

48. Szafranski v. Dunston, 34 N.E.3d 1132, 1136 (Ill. Ct. App. 2015).

49. *Id.* at 1140 ("Jacob ended their relationship in a text message.").

50. *Id.* at 1136; *see also* Szafranski v. Dunston, 993 N.E.2d 502, 505 (Ill. Ct. App. 2013) ("Appellee attached to her motion a letter from [a doctor] stating that appellee has ovarian failure as a result of her chemotherapy treatment which has 'rendered [her] unable to conceive a child with the use of her own oocytes.'" (second alteration in original)).

51. *Szafranski*, 34 N.E.3d at 1137.

52. *Id.*

53. *See id.*

54. *Id.* at 1147.

55. *Id.* at 1138, 1151–52 ("Karla told Jacob that the plan was to retrieve a large number of eggs, fertilize a portion, and then freeze the resulting pre-embryos while she underwent her chemotherapy treatment. Karla asked if he would 'be willing to provide sperm to make pre-embryos with her.' He responded 'yes,' telling Karla that he wanted to help her have a child.").

56. *Id.* at 1137.

the absence of an oral or written contract, the court would have still found for the woman under the balancing interests test.[57]

3. The Contemporaneous Mutual Consent Approach

The contemporaneous mutual consent approach suggests "no embryo should be used by either partner, donated to another patient, used in research, or destroyed without the [contemporaneous] mutual consent of the couple that created the embryo."[58] In practice, this approach allows the parties to create a contract and modify that agreement with both parties' consent.[59] Both parties must agree before a court will allow either party to use embryos.

In *A.Z. v. B.Z.*, the Massachusetts Supreme Judicial Court considered the disposition of embryos created by a couple who signed a consent form designating the embryos to the woman for implantation in the event the couple became "separated."[60] Unlike previous decisions, *A.Z.* looked to the intention of the consent form, which the court found to merely "define the donors' relationship as a unit with the clinic."[61] The court further devalued the consent form because it lacked a durational provision, and the term "separation" was legally distinct from "divorce."[62]

For these reasons, the court in *A.Z.* refused to honor the parties' IVF consent form.[63] The court also stated that even if the consent form were legally sufficient, it would not be enforced for public policy reasons.[64] It found that agreements to enter into marriage or parenthood "should not be enforced against individuals who subsequently reconsider their decisions" – here, the man, who now objected to the woman's use of the embryos.[65] Instead, in order for one of the parties to use the embryos over the objection of the other, the court required contemporaneous mutual consent.[66] Stated differently, because the woman wanted to use the parties' embryos but her partner now objected,

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57. *Id.* at 1137, 1147 ("Karla's desire to have a biological child in the face of the impossibility of having one without using the embryos, outweighs Jacob's privacy concerns . . . and his speculative concern that he might not find love with a woman because he unhesitatingly agreed to help give Karla her last opportunity to fulfill her wish to have a biological child.").

58. Coleman, *supra* note 8, at 110; *see also* Szafranski v. Dunston, 993 N.E.2d 502, 510 (Ill. Ct. App. 2013) (exemplifying the issues of contractual assent).

59. *See* Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

60. A.Z. v. B.Z., 725 N.E.2d 1051, 1054 (Mass. 2000).

61. *Id.* at 1056.

62. *Id.* at 1057.

63. *Id.*

64. *Id.* at 1057–58 ("As a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement.").

65. *Id.* at 1059.

66. *Id.*; *see* Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer*, 24 J. AM. ACAD. MATRIM. LAW. 57, 59 (2011).

the woman would need to change her partner's mind before she would be entitled to use the embryos. Because mutual consent did not exist, the court refused to allow the woman to implant the frozen embryos against the man's wishes.[67]

Although these three methods of resolving the disposition of frozen embryos have given courts guidance, some states have enacted legislation to prevent litigation from reaching the courts.

B. State Legislation Addressing Frozen Embryos

Although no Missouri statute directly addresses embryonic disputes, two Missouri statutes attempt to define the point at which "life" begins. Section 1.205 of the Missouri Revised Statutes notes, "[L]ife of each human being begins at *conception*."[68] It continues, "[T]he term **'unborn children'** or **'unborn child'** shall include all unborn child or children or the offspring of human beings from the *moment* of conception until birth at every stage of biological development."[69] In addition, section 188.015 reiterates that life begins "from the moment of conception until birth and at *every stage of its biological development, including . . . embryo*[s]."[70] This language suggests that an embryo, as the fruit of conception, is life with protectable interests.[71] Yet, ambiguity remains because the statutes repeatedly reference "biological development," and freezing an embryo likely halts its biological development.

Other states have gone further. In anticipating complex legal issues surrounding embryonic disputes, some states have created statutes that attempt to define "embryo" or that direct those couples who go through IVF procedures to take appropriate action in order to prevent later disputes.[72] In Florida, a couple seeking cryopreservation of embryos "shall enter into a written agreement that provides for the disposition of the commissioning couple's . . . preembryos in the event of a divorce, the death of a spouse, or any other unforeseen circumstance."[73] If no agreement exists, Florida has designated that

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67. *A.Z.*, 725 N.E.2d at 1059.

68. MO. REV. STAT. § 1.205(1) (2016) (emphasis added).

69. *Id.* at § 1.205(3) (bold in original) (emphasis added).

70. MO. REV. STAT. § 188.015(9) (2016) (emphasis added). Section (10) continues, "**'Viability' 'or 'viable'**, that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." *Id.* at § 188.015(10) (bold in original).

71. McQueen v. Gadberry, 507 S.W.3d 127, 140 (Mo. Ct. App. 2016); MO. REV. STAT. § 1.205(1)(2) (2016) ("Unborn children have protectable interests in life, health, and well-being . . . ."); *see also* Brief for Appellant at 1, McQueen v. Gadberry, 507 S.W.3d 127 (Mo. Ct. App. 2016) (No. ED103138), 2015 WL 9582009, at *1 (arguing same). In addition, an embryo that is deemed life will receive legal protection through an appointed guardian ad litem. MO. REV. STAT. § 452.423(1) (2016).

72. FLA. STAT. ANN. § 742.17 (West 2017); LA. STAT. ANN. § 9:121 (2017).

73. § 742.17.

decision-making authority should "reside jointly with the . . . couple."[74] Florida's statute effectively acts as a method of contemporaneous mutual consent because it encourages couples to enter into a pre-agreement and does not allow one party to act unilaterally.[75]

The New Hampshire legislature enacted a bill mandating that, before an embryonic transfer procedure, the potential parents must "make guardianship provisions for the prospective child by amending their existing estate planning documents, or by executing estate planning documents . . . if they have no existing estate planning documents."[76] Further, couples must go through medical examinations and counseling before embryonic transfer.[77] This law encourages parties to plan for the future of their prospective child.

In 1986, Louisiana enacted a statute designating that "[a] 'human embryo' . . . is an in vitro fertilized human ovum, with certain rights granted by law, composed of one or more living human cells and human genetic material so unified and organized that it will develop in utero into an unborn child."[78] Courts interpret this statute to mean that an embryo is a "juridical person" that must be implanted and cannot be discarded.[79]

C. International Methods and Alternative Approaches

The United States is not alone in dealing with frozen embryo disputes. Across the globe, Italy was once considered the "Wild West" of alternative reproduction technologies.[80] Italian doctors dabbled in cloning, race selection, and IVF treatment on women well-beyond childbearing age.[81] In 2004, Italy passed the Regulation of Medically Assisted Reproduction law, largely in response to religious pressure.[82] The law shifted the country from a "completely

74. § 742.17(2).

75. § 742.17.

76. N.H. REV. STAT. ANN. § 168-B:15 (2017).

77. *See* Kass v. Kass, 696 N.E.2d 174, 178 (N.Y. 1998) (interpreting New Hampshire statutes to require couples to "undergo medical exams and counseling"); *see also* A.Z. v. B.Z., 725 N.E.2d 1051, 1055 (Mass. 2000) (same); Roman v. Roman, 193 S.W.3d 40, 44 n.6 (Tex. App. 2006) (same).

78. LA. STAT. ANN. § 9:121 (2017).

79. *Kass*, 696 N.E.2d at 178; *A.Z.*, 725 N.E.2d at 1055; *Roman*, 193 S.W.3d at 44 n.6; *In re* Marriage of Dahl & Angle, 194 P.3d 834, 841 n.6 (Or. Ct. App. 2008). A "juridical person" is an entity that is not a natural person but has legal rights and obligations recognized by the law. *What Is a Juridical Person?*, L. DICTIONARY, http://thelawdictionary.org/juridical-person/ (last visited Sept. 8, 2017).

80. Morgan De Ann Shields, Comment, *Which Came First the Cost or the Embryo? An Economic Argument for Disallowing Cryopreservation of Human Embryos*, 9 J.L. ECON. & POL'Y 685, 712 (2013).

81. *Id.*

82. *Id.*

unregulated IVF regime to [having] some of the harshest restrictions worldwide."[83] The law prohibits the freezing of embryos, allows only three embryos to be fertilized and implanted at a time, and forbids posthumous IVF treatment.[84] Proponents of the law claim it is an effective means of protecting women from risky procedures and potential health risks associated with multiple pregnancies.[85] However, opponents of the law argue it effectively halts scientific development, promotes "infertility tourism" to neighboring countries, and "assign[s] a higher value to protection of embryos than to the interests of infertile women."[86]

In response to historical Nazi abuse, Germany passed The Embryo Protection Act of 1990 to protect against "violations of humanity."[87] While couples are still permitted to participate in IVF treatments, the act heavily regulates the creation, preservation, and destruction of embryos.[88] The act prescribes only three embryos may be created and implanted at one time, prohibits posthumous procreation, and bars embryonic cryopreservation.[89] Such limitations were designed to prevent the recurrence of medical abuses undertaken during the Nazi era, as well as to protect women from multiple gestations and accompanying pregnancy complications.[90] In a sense, the act attempts to balance the

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83. *Id.* ("Before this Law was passed, Italy had the most unregulated ART industry in Europe.").

84. *Id.*; Mary Rodgers Bundren, *The Influence of Catholicism, Islam and Judaism on the Assisted Reproductive Technologies ("Art") Bioethical and Legal Debate: A Comparative Survey of Art in Italy, Egypt and Israel*, 84 U. DET. MERCY L. REV. 715, 732 (2007).

85. *See* Bundren, *supra* note 84, at 730–33.

86. *Id.* at 733 ("Because abortion is still legal in Italy, aborting a fetus at sixteen-weeks gestation is tolerated; however, dropping an embryo culture dish in the laboratory may be considered homicide."). The term "infertility tourism" refers to travel due to differences in cost, decreased administrative barriers, or other treatments prohibited by a person's own country. Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 303–04 (2005).

87. Shields, *supra* note 80, at 709–10 (quoting Tanja Krones, *The Scope of the Recent Bioethics Debate in Germany: Kant, Crisis, and No Confidence in Society*, 15 CAMBRIDGE Q. HEALTHCARE ETHICS 273, 277 (2006)). Shields writes,

> Germans[] have, due to our history of Nazi Germany, a high sensitivity and fear of making horrible mistakes again. Therefore, we have to be exceedingly suspicious and cautious with regard to developments that might have the potential for violating human dignity in our society Only strict legislation, such as the E[mbryo] P[rotection] A[ct], rooted in our Constitution, offers protection against violations of humanity.

Id. at 710 (second, third, and fourth alterations in original) (quoting Krones, *supra*, at 710).

88. *Id.* at 709.

89. *Id.*

90. *Id.* at 710; John A. Robertson, *Reproductive Technology in Germany and the United States: An Essay in Comparative Law and Bioethics,* 43 COLUM. J. TRANSNAT'L

woman's interest in having a child with the state's interest in preventing multiple gestations for its citizens.[91]

One scholar has argued that the United States should follow Italy and Germany by prohibiting cryopreservation of embryos altogether.[92] By enacting legislation that bans cryopreservation, litigation would subside, IVF procedures would be standardized, and costs associated with IVF procedures and resulting births would be reduced.[93] Regardless, litigation surrounding IVF and frozen embryo disputes presents difficult issues for courts across the country and worldwide. The Missouri courts have avoided such controversies – until now.[94]

III. RECENT DEVELOPMENTS

In Missouri, case law regarding embryonic disposition is scant. However, in November 2016, the Missouri Court of Appeals, Eastern District, addressed a dispute over frozen embryos in *McQueen v. Gadberry*.[95] As a case of first impression, *McQueen v. Gadberry* will undoubtedly direct future litigation on artificial reproductive technologies and may pressure the Missouri legislature to enact legislation relating to these issues. Part A of this section explains the relevant facts surrounding the dispute and each party's arguments on appeal. Part B discusses the analysis and holding of *McQueen v. Gadberry* and its implications for Missouri jurisprudence.

A. Relevant Facts

Jalesia McQueen and Justin Gadberry were married in September 2005.[96] In early 2007, while Gadberry was stationed at a North Carolina military base, four embryos were created after the couple underwent IVF procedures.[97] Two of the embryos were successfully implanted, and McQueen eventually gave birth to twin boys.[98] The other two embryos were frozen and remain in storage.[99] Later, the couple was forced to move their frozen embryos to another

L. 189, 207 (2004) ("Pregnancies with two or more fetuses carry extra burdens and substantial health risks for both the woman and the offspring.").

91. Robertson, *supra* note 90, at 206.

92. Shields, *supra* note 80, at 713.

93. *Id.*

94. McQueen v. Gadberry, 507 S.W.3d 127, 132 (Mo. Ct. App. 2016).

95. *Id.*

96. *Id.* at 133.

97. *Id.* at 133–34.

98. *Id.* at 134.

99. *Id.*

fertility clinic in Virginia, the Cryobank, at which point they signed an agreement form regarding the disposition of the embryos.[100] The form stated that in the event of divorce, the embryos would be "[u]sed by . . . McQueen."[101]

McQueen and Gadberry separated in September 2010.[102] The dissolution of the couple's marriage proceeded smoothly with one exception – custody of the two frozen embryos.[103] Before the eventual trial, the court appointed a guardian ad litem ("GAL") to represent the frozen embryos, an interesting development itself, as this implied the embryos had independent legal rights that required protection.[104] Ultimately, the trial court awarded McQueen and Gadberry joint custody of the embryos, specifically prohibiting any transfer, release, or use of the frozen embryos without the signed authorization of both McQueen and Gadberry.[105] McQueen appealed to the Missouri Court of Appeals, Eastern District.[106]

McQueen maintained three arguments on appeal.[107] First, McQueen claimed Missouri law recognizes embryos, including frozen embryos, as children complete with rights to "life, health and well-being."[108] Consequently, she sought "custody" of the frozen embryos.[109] McQueen argued in the alternative that even if the frozen embryos were considered marital property, she should be awarded the embryos because the cryopreservation contract was valid and enforceable against Gadberry.[110] Finally, McQueen claimed that the court-appointed GAL did not fulfill her legal duty to protect the embryos' best interest.[111]

Conversely, Gadberry argued that awarding McQueen the frozen embryos would violate his constitutional rights to privacy and equal protection and his right not to procreate.[112] Gadberry posited the trial court was correct in characterizing the frozen embryos as marital property and designating that

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100. *Id.* at 135.

101. *Id.* at 153. Although the specific contract provision is uncontested, Gadberry argued there was no discussion of the final disposition of the embryos and alleged the contract was completed outside of Gadberry's presence. *Id.* at 155.

102. *Id.* at 133.

103. *Id.*

104. *Id.* ("[T]he trial court . . . apparently *sua sponte*, appointed a guardian ad litem ("GAL") for the frozen pre-embryos.").

105. *Id.* at 132.

106. *Id.* at 127.

107. *Id.* at 137.

108. *Id.* at 136 (citing MO. REV. STAT. § 1.205 (2000)). The court states, "Missouri law . . . recognizes an embryo is a person with protectable rights in life, health and well-being from the moment of conception onward, unless such protection is barred by the U.S. Constitution and decisional interpretation thereof." *Id.* (citing § 1.205 (2000)).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 136–37.

no transfer, release, or use of the embryos could occur unless the parties agreed.[113]

B. The Court's Analysis and Holdings

The Missouri Court of Appeals, Eastern District, addressed two main issues in its opinion. First, the court discussed "[w]hether the legislature's declarations [that life begins at conception/fertilization] constitutionally apply to frozen pre-embryos and whether frozen pre-embryos should be considered 'children' under Missouri's [marriage] dissolution statutes."[114] Specifically, the court discussed whether section 1.205 of the Missouri Revised Statutes can be read *in pari materia* with Missouri's statute for marriage dissolution.[115] Section 1.205 says, "The life of each human being begins at conception" and "the term 'unborn children' . . . shall include all unborn . . . children . . . from the moment of conception until birth at every stage of biological development."[116] Further, it states that "[u]nborn children have protectable interests in life, health, and well-being."[117] However, and crucial to the court's decision, section 1.205 also notes that Missouri recognizes unborn children as persons with protectable interests "subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court."[118] The court accordingly held that "Missouri Courts should read all Missouri statutes *in pari materia* (harmoniously) with section 1.205 so long as such a reading does not violate a party's constitutional right afforded to . . . her by the U.S. Constitution and decisional interpretations thereof by the U.S. Supreme Court."[119]

The court then gave various examples of Missouri case law in which section 1.205 was constitutionally applied to other statutes, demonstrating that it could be read consistently with constitutional rights.[120] For example, the court

113. *See id.* at 137.

114. *Id.* at 142.

115. *Id.*; *see also* MO. REV. STAT. § 1.205 (2016). Statutes read *in pari materia* are generally on the same topic or subject matter and are construed together. *What Is In Pari Materia?*, L. DICTIONARY, http://thelawdictionary.org/in-pari-materia/ (last visited Sept. 8, 2017); Matthew Davis, Note, *Statutory Interpretation in Missouri*, 81 MO. L. REV. 1127, 1139 (2016) ("Ambiguous statutory language should be read in light of separate statutes concerning the same subject matter, more commonly known as statutes *in pari materia*.").

116. § 1.205 (bold omitted). McQueen also relied on section 188.015 to further define the term "unborn." *McQueen*, 507 S.W.3d at 140; MO. REV. STAT. § 188.015(9) (2016) ("'Unborn child', the offspring of human beings from the moment of conception until birth and at every stage of its biological development, including the human conceptus, zygote, morula, blastocyst, embryo, and fetus.").

117. § 1.205.1(2).

118. § 1.205.2.

119. *McQueen*, 507 S.W.3d at 142.

120. *See id.* at 141–43.

noted section 1.205 has been applied to both civil and criminal statutes against third parties for allegedly causing the death of an unborn fetus.[121] And, cases applying section 1.205 to other statutes have explicitly held that such an application does not violate Supreme Court precedent – specifically, *Roe v. Wade*.[122] But, the court made a critical distinction: section 1.205 has only been constitutionally applied to other statutes where an unborn fetus is *in utero*; it has never been applied where an unborn embryo is *in vitro*, as was the case here.[123] With this in mind, the court proceeded to question whether reading section 1.205 harmoniously with the Missouri marriage dissolution statues – or, recognizing in vitro embryos as persons – would violate either party's constitutional rights.[124]

The court used the balancing interests approach to weigh the rights and interests of McQueen and Gadberry.[125] Before addressing the parties' interests, the court reiterated that the case considers frozen embryos *in vitro*, so the issues presented "[do] not implicate McQueen's right to bodily integrity in the area of reproductive choice under *Roe* [*v. Wade*] which would outweigh any of Gadberry's interests in avoiding parenthood."[126] Instead, McQueen and Gadberry "must be seen as entirely equivalent gamete providers," each with individual procreation rights.[127]

Having determined that McQueen and Gadberry possessed equally-vested rights, the court addressed the relative interests of the parties.[128] The court found McQueen's necessity to use the frozen embryos to be non-existent.[129] The court noted that McQueen did not seek IVF due to fertility issues but because she and Gadberry were separated geographically.[130] Moreover, McQueen had twin boys as a result of a successful IVF procedure and had

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121. *Id.* at 141; State v. Wade, 232 S.W.3d 663, 665 (Mo. Ct. App. 2007); Bailey v. State, 191 S.W.3d 52, 54–55 (Mo. Ct. App. 2005).

122. *McQueen*, 507 S.W.3d at 144; *see also* Roe v. Wade, 410 U.S. 113 (1973); Webster v. Reprod. Health Servs., 492 U.S. 490, 504–07 (1989); State v. Holcomb, 956 S.W.2d 286, 289–93 (Mo. Ct. App. 1997); State v. Rollen, 133 S.W.3d 57, 58–64 (Mo. Ct. App. 2003); *Bailey*, 191 S.W.3d at 55.

123. *McQueen*, 507 S.W.3d at 141; *see also Roe*, 410 U.S. at 120; *Webster*, 492 U.S. at 504–07; *Holcomb*, 956 S.W.2d at 289–93; *Rollen*, 133 S.W.3d at 58–64; *Bailey*, 191 S.W.3d at 53–54.

124. *McQueen*, 507 S.W.3d at 143.

125. *Id.* at 144. The court first noted that it did not recognize the signed cryopreservation agreement between McQueen and Gadberry as valid and enforceable, for reasons explained below. *Id.* Because there was not an enforceable contract, the court used the balancing interests approach. *Id.*

126. *Id.* at 145; *see also Roe*, 410 U.S. at 153–54.

127. *McQueen*, 507 S.W.3d at 144. A "gamete" is "one of the cells that join together to begin making a person or other creature." *Gamete*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/gamete (last visited Sept. 9, 2017).

128. *McQueen*, 507 S.W.3d at 145.

129. *Id.* at 145–46.

130. *Id.* at 146.

another child conceived "through traditional means."[131] The court did not find McQueen's interests persuasive because her "fundamental right to procreate would [not] be irrevocably extinguished."[132] To the contrary, the court found Gadberry's interests compelling.[133] Gadberry did not want to have more children with McQueen, so sustaining her appeal would have essentially made him a father against his wishes.[134] Unlike McQueen's rights – which were not irrevocably extinguished – if the frozen embryos were successfully implanted and brought to term, Gadberry's right not to procreate would be irrevocably extinguished.[135]

The court held that the legislature's intention for embryos to be recognized as persons, as stated in section 1.205, is simply "not sufficient to justify any infringement upon the freedom and privacy of Gadberry and McQueen to make their own intimate decisions."[136] In addition, the court held that applying section 1.205 to Missouri's marriage dissolution statutes would be "contrary to U.S. Supreme Court decisions interpreting the U.S. Constitution" and would violate Gadberry's constitutional right to privacy, right against government intrusion, and right not to procreate.[137] For these reasons, the court held that frozen embryos could not be considered "people" with protectable rights under the law.[138]

The court next considered whether it was appropriate for the trial court to classify the frozen embryos as "marital property of a *special character*."[139] The

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131. *Id.* at 145.
132. *Id.* at 146.
133. *Id.* at 147.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* In a lengthy and interesting footnote, the court explores potential difficulties with recognizing frozen embryos as persons. *Id.* at 147 n.21. The court notes,

> [I]n the area of criminal law, gamete providers or fertility workers could possibly be charged with and convicted of various forms of murder and manslaughter, assault, or child abuse for intentionally or unintentionally destroying or "injuring" pre-embryos or frozen pre-embryos and for cryogenically preserving pre-embryos and placing them in long-term or indefinite storage. . . . And in the area of civil law, (1) gamete providers or fertility workers could be sued for wrongful death for destroying pre-embryos or frozen pre-embryos; and (2) there could be potential problems with a couple or individuals donating pre-embryos or frozen pre-embryos to others because donation would arguably have to be governed by Missouri's adoption statutes . . . which are currently unequipped to regulate such forms of adoption.

Id.

138. *Id.* at 147–48.
139. *Id.* at 148.

court began by noting that property, including marital property, embraces "*external* thing[s] over which the rights of [] use [] are exercised."[140] According to the court, frozen embryos are property because they are *in vitro*, which is external.[141] However, the court recognized that frozen embryos are "special" and are "entitled to special respect" because they have the potential to become children.[142] Indeed, the frozen embryos were given special respect when the trial court ordered that they remain cryogenically preserved and stored until the parties could agree to change the status quo.[143] The court noted that this ruling showed respect because only McQueen and Gadberry should have determinative decision-making authority.[144] Consequently, the court held that frozen embryos are "marital property of a *special character*."[145]

Subsequently, the court addressed McQueen's arguments in the alternative.[146] McQueen argued that even if the frozen embryos are considered property and not humans, she should be awarded the embryos because the cryopreservation agreement, which was in her favor, was valid and enforceable.[147] The court also addressed her claim that it was required to divide all marital property, including the frozen embryos, between McQueen and Gadberry instead of awarding them to the couple jointly.[148]

To begin, the court noted that "[p]roperty acquired during the marriage is presumed to be marital property, but a party may overcome this presumption if . . . she shows the property is separate."[149] McQueen claimed that the frozen embryos could not be jointly owned by her and Gadberry because the embryos were deemed "separate" by the couple's cryopreservation agreement.[150] Before determining whether the property was "separate," the court considered the preliminary question of whether the contract was entered into "freely, fairly, knowingly, understandingly, and in good faith with full disclosure."[151] The court eventually answered this question in the negative.[152]

Supporting its conclusion, the court pointed to several key facts.[153] First, the court highlighted conflicting testimony as to whether McQueen and Gadberry had discussed the potential disposition of their frozen embryos before

140. *Id.* (quoting *Property*, BLACK'S LAW DICTIONARY 1232 (7th ed. 1999)).
141. *Id.* at 148–49.
142. *Id.* at 149.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 151. The couple's cryopreservation contract designated that in the case of separation or divorce, the frozen embryos would be "[u]sed by Jalesia F. McQueen." *Id.* at 153.
148. *Id.* at 156.
149. *Id.* at 151 (citing Thorp v. Thorp, 390 S.W.3d 871, 876 (Mo. Ct. App. 2013)).
150. *Id.*
151. *Id.* at 151–52, 156.
152. *Id.* at 155–56.
153. *Id.* at 155.

signing the agreement.[154] The court also found that Gadberry "did not sign the [contract] with the intent that McQueen be awarded the frozen pre-embryos in the event of a divorce."[155] Further, it recognized the designation that the frozen embryos would be "[u]sed by Jalesia F. McQueen" was handwritten in black ink next to the couple's initials, which were in blue ink.[156] The court found that this indicated the contract may have been "filled in after Gadberry initialed the page."[157] The court also noted that the page designating the embryos' disposition was completed by McQueen and Gadberry six days after the last page of the agreement, the "signature page," was signed and notarized.[158] For these reasons, the court held that the contract was unenforceable and that there was not enough evidence to render the frozen embryos as "separate" property to be awarded to McQueen.[159]

Next, the court gave no merit to McQueen's claim that it was required to "divide" the frozen embryos and award them to either McQueen or Gadberry.[160] Missouri precedent does not preclude courts from awarding marital property jointly under unusual circumstances, and McQueen and Gadberry's circumstances were certainly unusual.[161] The court also reiterated its previous holding that without mutual consent, the frozen embryos were not to be transferred, released, or used by either party precisely because this "subjects neither party to any unwarranted governmental intrusion but rather leaves the intimate decision of whether to potentially have more children to the parties alone."[162]

Finally, the court cast aside McQueen's argument that the court-appointed GAL did not fulfill her legal duties to advocate for the interests of the frozen embryos because "support of *children* [was] not [a] contested issue[] in this case."[163] Having already established that frozen embryos are not considered persons, the issue of GAL intervention was effectively moot.[164]

The court in *McQueen v. Gadberry* was the first to directly address the issue of whether frozen embryos are legal persons.[165] Its analysis and implications are certain to be tested by other courts in the future.[166] Next, Part IV

154. *Id.*

155. *Id.*

156. *Id.* at 154 (alteration in original).

157. *Id.* at 155.

158. *Id.* at 154.

159. *Id.* at 156. The court also held that Gadberry did not waive any or all of his rights to the frozen embryos. *Id.* at 155.

160. *Id.* at 156–58.

161. *Id.* at 157.

162. *Id.*

163. *Id.* at 150.

164. *Id.*

165. *Id.* at 142.

166. Following the decision in *McQueen v. Gadberry*, House Bill 2558 was proposed by the Missouri legislature but failed to become law. The bill would have recognized in vitro human embryos as human beings with constitutional rights, directed the courts to award custody of the embryos based on the embryos' "best interests," and

tackles a different question – how can reproductive donors avoid litigating embryonic disputes altogether?

IV. DISCUSSION

Case law gives rise to a hierarchy of priorities related to embryonic disputes. Courts generally prefer to honor these types of contracts unless a contract allows one party to have a child against the other's wishes.[167] Sometimes courts disregard a contract and instead rule after balancing the parties' rights or requiring the parties to agree.[168] Courts have generally found that each donor's right not to procreate trumps a general interest in having children.[169] Yet when a woman is found to have no other reasonable means of having children naturally, her right to reproduce typically supersedes the other's right not to procreate.[170] This Part argues that cryopreservation agreements should be required by state law and enforced by courts; but, because of the stakes involved, cryopreservation agreements should be presumed enforceable only when parties consult with independent counsel before signing.

A. Courts Should Honor Contracts to Recognize Couples' Rights to Procreate (or Not to)

IVF and other alternative forms of reproduction offer struggling couples opportunities to have children that they may not have otherwise.[171] Given the private nature of procreation, couples should have the right to control their reproduction choices, and courts should recognize these rights by allowing parties to designate embryonic disposition when certain events occur.[172] In order to maximize a couples' rights – and minimize the negative consequences of other approaches – courts should enforce contracts that represent a couples' designations.[173] Without a contract, courts run the risk of improperly

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created a presumption that the "best interests" of the embryos were for it to be developed to birth. *See* H.B. 2558, 98th Gen. Assemb., 2nd Reg. Sess. (Mo. 2016).

167. *See, e.g.*, Reber v. Reiss, 42 A.3d 1131, 1140–42 (Pa. Super. Ct. 2012); A.Z. v. B.Z., 725 N.E.2d 1051, 1057 (Mass. 2000).

168. *McQueen*, 507 S.W.3d at 144.

169. *Id.* at 146–47.

170. *See, e.g.*, Szafranski v. Dunston, 34 N.E.3d 1132, 1162 (Ill. Ct. App. 2015).

171. *See* Robertson, *supra* note 6, at 424. Aside from IVF, other alternative forms of reproduction include artificial insemination, egg or sperm donation, use of a surrogate, zygote intrafallopian transfer, gamete intrafallopian transfer, or intracytoplasmic sperm injection. *See Infertility FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/reproductivehealth/infertility/ (last visited Sept. 8, 2017).

172. Robertson, *supra* note 6, at 424.

173. Sara D. Petersen, Comment, *Dealing with Cryopreserved Embryos upon Divorce: A Contractual Approach Aimed at Preserving Party Expectations*, 50 UCLA L. REV. 1065, 1082–83 (2003).

"valu[ing] the reproductive concerns of the persons involved" and imposing those values on a couple.[174]

Unfortunately, enforcing a contract as written may mean that a party who changes his or her mind as to the disposition of the embryos is left unsatisfied.[175] But, "[f]reedom to contract or to make directives binding in future situations enhances liberty even though it involves constraints on what may occur once the future situation comes about."[176] Enforcing contracts also "provides incentives for the [fertility] clinics themselves to proffer relevant information and well-drafted consent forms that encourage their customers to plan carefully."[177] If couples realize their contract will be enforced, they are more likely to "make a thoughtful and informed decision regarding the disposition of their frozen embryos."[178] On the other hand, if courts inconsistently enforce agreements, there is little incentive for couples to think carefully about the future disposition of their frozen embryos.[179] Today's environment encourages litigation, given there is little legislation in this field and courts' decisions have resulted in a variety of holdings.[180] If, however, courts routinely honor prior agreements, the time and costs associated with litigation over embryo disputes will decrease.[181] Any concerns about strict enforcement would be unnecessary, as contract law allows courts to void cryopreservation agreements where certain standards are not met, namely in situations of fraud, mistake, or coercion.[182] Finally, due to the sensitive and significant issues involved, courts should approach agreements with greater skepticism before enforcing an agreement against a donor who later changes his or her wishes.[183]

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174. Robertson, *supra* note 6, at 415.

175. *Id.*

176. *Id.*

177. Petersen, *supra* note 173, at 1084.

178. Meagan R. Marold, *Ice, Ice, Baby! The Division of Frozen Embryos at the Time of Divorce*, 25 HASTINGS WOMEN'S L.J. 179, 195 (2014); *see also* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981) (arguing that the framing of a decision and its consequences affects a person's choice preferences).

179. *See* Marold, *supra* note 178, at 195.

180. Robertson, *supra* note 6, at 418.

181. *Id.*

182. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 164 (AM. LAW INST. 1981). Contracts can also be deemed unenforceable in grounds of violation of public policy. Petersen, *supra* note 173, at 1089 ("[T]he Restatement (Second) of Contracts provides for unenforceability on grounds of public policy, invalidation in accordance with this provision requires that the public policy interest clearly outweigh[s] the interest in enforcing the contract terms." (footnote omitted)).

183. *See* Sandra Kennedy, Note, *Ignorance Is Not Bliss: Why States Should Adopt California's Independent Counsel Requirement for the Enforceability of Prenuptial Agreements*, 52 FAM. CT. REV. 709, 713 (2014).

B. Independent Counsel Should Be Required

States should require parties to consult with independent counsel before a cryopreservation agreement is presumed enforceable. Such a rule would provide, at a minimum, two benefits. First, it would make parties more knowledgeable and aware of their rights at stake. A competent attorney can guide his or her clients away from potential problems that lead to litigation. Second, even if a couple makes what some might see as an unfair agreement (e.g., awarding frozen embryos to the woman for gestation in the event of divorce), enforcing the couples' contract is more justifiable knowing that the parties entered into the contract after consultation with independent counsel.[184]

Cryopreservation agreements, as with most contracts, can have a plethora of supplemental clauses, addendums, and technical terms.[185] As one observer notes, "The presentation of the countless forms coupled with the contemplation of death and divorce in a time of supposed happiness for the parents-to-be, makes it nearly impossible to form a thoughtful and informed decision about . . . your embryos . . . in the event one of the contingencies should occur."[186] Given the mix of emotions many experience at this time, each party should be required to seek counsel so that the serious and long-lasting consequences associated with the disposition of the embryos may be discussed.

Consulting independent counsel has been mandated in other situations, such as prenuptial agreements.[187] Historically, prenuptial agreements were presumed unenforceable because they were "contrary to the concept of marriage."[188] As the country's attitude and cultural values shifted, "paternalism demonstrated by earlier courts has decreased as overall enforceability [of prenuptial agreements] has risen."[189] Although now presumably enforceable, prenuptial agreements still adhere to traditional contract law.[190] Agreements are

184. Essential to every contract is a "meeting of the minds," also known as mutual assent. *See* Richard Stim, *Contracts: The Basics*, NOLO, http://www.nolo.com/legal-encyclopedia/contracts-basics-33367.html (last visited Sept. 8, 2017). Key to mutual assent is a shared understanding of essential terms. *Id.* Consulting an attorney can ensure that donors understand and accept the key terms to a cryopreservation agreement. *See id.*

185. Marold, *supra* note 178, at 195–96.

186. *Id.* at 196.

187. "A prenuptial agreement ("prenup" for short) is a written contract created by two people before they are married." *Prenuptial Agreements: Who Needs It and How Do I Make One?*, NOLO, http://www.nolo.com/legal-encyclopedia/prenuptial-agreements-overview-29569.html (last visited Sept. 8, 2017). "A prenup typically lists all of the property each person owns (as well as any debts) and specifies what each person's property rights will be after the marriage." *Id.*; *see generally* Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887 (1997).

188. Marston, *supra* note 187, at 897 ("Until 1970, prenuptial agreements providing for the disposition of assets upon divorce were unenforceable in the United States.").

189. *Id.* at 898.

190. *Id.*

enforceable only when entered into voluntarily, knowingly, and without duress or undue influence.[191] Nonetheless, some prenuptial agreements are the result of last-minute decisions, and yet others reveal significant imbalances in the distribution of assets.[192] In light of these increasingly common and unjust outcomes, certain courts have required couples to seek independent counsel before entering into a prenuptial agreement.[193] These courts maintain that couples entering into prenuptial contracts should be well informed of their rights, should understand the terms of the contract, and should be assured of the enforceability of their agreement so that future litigation is unlikely.[194]

Similarly, cryopreservation agreements would benefit from an independent-counsel requirement. Like a prenuptial agreement, frozen embryo contracts deal with parties at a deeply-sensitive time in their lives.[195] Further, both types of contracts – hopefully – reach parties when they are eager and excited for the future. An independent-counsel requirement would ensure the parties have contemplated, or are at least knowledgeable of, the legal implications of their decisions. Current cryopreservation case law is noticeably riddled with contractual disputes. For example, one agreement provided for embryo disposition in the event of "separation," but it did not specifically address "divorce."[196] Another couple did not reach an agreement regarding embryo disposition in the case of divorce or separation, or even discuss the issues generally.[197] Moreover, one man routinely signed cryopreservation forms in the car on the way to the fertility clinic before any details had been written down.[198] Instead of making rash decisions, an independent-counsel requirement would encourage "couples [to] make disposition decisions only after careful, compassionate consideration of various circumstances that could arise and alter their situations."[199]

An independent-counsel requirement would benefit parties by allowing an attorney to anticipate potential legal issues and clarify each member's rights at stake. Furthermore, consultation with independent counsel can and should be a crucial factor in determining whether an apparent waiver of rights should be enforced. A recurring example in case law features a cryopreservation con-

191. *Id.* at 909–10.

192. *Id.* at 912–13; *see also* Rowland v. Rowland, 599 N.E.2d 315, 316–17 (Ohio Ct. App. 1991) (finding a prenuptial agreement invalid where a man threatened to forego marrying his pregnant fiancé, who was not represented by independent counsel, if she did not waive her rights to alimony and property valued over $150,000.).

193. Kennedy, *supra* note 182, at 716–17.

194. *Id.*

195. Petersen, *supra* note 173, at 1087–88.

196. *See* A.Z. v. B.Z., 725 N.E.2d 1051, 1054, 1057 (Mass. 2000).

197. *See* Davis v. Davis, 842 S.W.2d 588, 592 (Tenn. 1992).

198. *See A.Z.*, 725 N.E.2d at 1054.

199. Petersen, *supra* note 173, at 1088.

tract empowering a woman to implant frozen embryos should the couple divorce or otherwise separate.[200] If such an event occurs and the man no longer agrees with the contract's terms, the court is left to decide whether to enforce the contract and allow the woman to use the frozen embryos against the man's wishes. Stated differently, the court must decide whether to force the man to procreate given the parties' earlier contract. The rights to procreate and not to procreate have been considered "a vital part of an individual's right to privacy" and deemed "the most comprehensive of rights and the right most valued by civilized men."[201] But, like most rights, the right not to procreate can be waived – as in this example, by contract.[202] To enforce a waiver of such intimate rights, courts should require proof that the agreement was entered into voluntarily and with full knowledge of the affected rights.[203] The best way to determine if the agreement was entered into voluntarily and with adequate knowledge is to examine whether the couple sought independent counsel before signing their agreement.[204]

An independent-counsel requirement, although beneficial and important for multiple reasons, has downsides. A requirement to consult counsel would undoubtedly add time to the already lengthy process of IVF. Requiring independent counsel for each cryopreservation contract would also increase costs.[205] Legal fees can be a significant burden, especially when coupled with the costs of cryopreservation and the IVF procedure, which are typically substantial.[206] But, legal fees would constitute only a small portion of the total cost of IVF procedures. Further, as cryopreservation of embryos becomes more common, fertility clinics should develop standard form contracts to expedite and simplify the process of consulting an attorney, thus decreasing the associated costs.

For some, adding an independent-counsel requirement does not remedy a contract's failure to protect societal interests.[207] For example, although prenuptial agreements are presumed enforceable, any designation for child support is usually not honored due to the court's and society's independent interests in

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200. *See, e.g.*, Szafranski v. Dunston, 34 N.E.3d 1132, 1149 (Ill. App. Ct. 2015); *see A.Z.*, 725 N.E.2d at 1059; McQueen v. Gadberry, 507 S.W.3d 127, 145 (Mo. Ct. App. 2016).

201. *Davis*, 842 S.W.2d at 599, 600 (second quotation quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

202. Robertson, *supra* note 6, at 422.

203. *Id.* at 423 ("With so much hinging on the options chosen, [fertility] programs should take great care to make sure that the couple is fully aware of the consequences of their choices and the alternatives foregone.").

204. *C.f.* Kennedy, *supra* note 183, at 710 (demonstrating that in the context of prenuptial agreements the use of independent counsel has made some courts more likely to uphold an agreement challenged on voluntariness and knowingness).

205. *C.f.* Marston, *supra* note 187, at 893 (showing the high costs of retaining counsel to draft prenuptial agreements).

206. Shields, *supra* note 80, at 696–709.

207. *See* Petersen, *supra* note 173, at 1086.

a child's well-being.[208] The enforcement of agreements allowing a surrogate to carry a couple's child for a fee has also been criticized for commodifying reproduction in a way that contradicts societal values.[209] However, cryopreservation agreements differ from prenuptial and surrogate contracts because designation of frozen embryo disposition does not deal with an exchange of money but rather "simply specif[ies] treatment of already created embryos."[210] And while prenuptial and surrogate contracts could be considered commercial transactions, cryopreservation agreements – when created appropriately – are considerate of countless contingences and circumstances. Undoubtedly, this is a complicated, sensitive, and intimate issue that is deeply personal. In such situations, it may be impossible to honor both parties' wishes and all of society's concerns.

Jalesia McQueen and Justin Gadberry signed a cryopreservation contract but now disagree on most of the important details. Had the couple consulted an attorney before signing the agreement, it may have been difficult for McQueen to add a clause to the contract without Gadberry's knowledge, and it would be absurd for Gadberry to now claim that he was unaware of a crucial contractual provision. Indeed, a quick meeting with independent counsel could have spared the couple from a lengthy, emotional lawsuit and saved the court from guessing as to the couple's actual intentions. Unfortunately, it was too late for McQueen and Gadberry to utilize an independent-counsel requirement, and their frozen embryos were left at the mercy of the court. But, as a case of first impression, Missouri now has the opportunity to encourage consultation with independent counsel so that disputes are less likely to arise, or, if they do, courts can resolve issues quickly and confidently.

V. CONCLUSION

At the writing of this Note, over 600,000 frozen embryos are in storage in the United States alone.[211] Even if a mere fraction of these embryos produce a legal dispute, courts will need clear guidance to address the sensitive and intimate issues at stake. A contractual approach, coupled with a requirement to consult independent counsel, will ensure that couples entering into a cryopreservation agreement understand the contract, its consequences, and their rights and potential obligations should death, divorce, or other changes in circumstance occur. Although not a perfect solution, the heightened independent-counsel requirement combined with more traditional rules of contract law will give courts the clearest path to honoring the parties' original wishes.

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208. Marston, *supra* note 187, at 898.

209. Petersen, *supra* note 173, at 1086–87.

210. *Id.*

211. *See Embryo Adoption*, U.S. DEPT. HEALTH & HUM. SERVICES, http://www.hhs.gov/opa/about-opa-and-initiatives/embryo-adoption/ (last visited Sept. 8, 2017).